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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 516

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY,
ARKANSAS FOUNDRY COMPANY,
GENERAL STEEL PRODUCTS COMPANY,
JEFFERY LUMBER COMPANY,
PADGETT LUMBER COMPANY,
CHOCTAW, INC.,
IRA SHERRILL,
MILL AND MINE SUPPLY COMPANY,
CROW-BURLINGAME COMPANY ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting writ	10
Conclusion	18

Appendix A

1. Opinion of Court of Appeals	A-1
2. Judgment of Court of Appeals	A-17

Appendix B

1. Defense Production Act, 1950	B-1
2. Arkansas Miners' Lien Statute	B-4
3. 28 U.S.C.A., Section 1652	B-6

CITATIONS

Page

Cases:

Bear Lake & River Waterworks & Irrigation Co. *v.* Garland (1896), 164 U.S. 1, 17 S. Ct. 17, 41 L. Ed. 327 13

Brine *v.* Hartford Fire Ins. Co. (1878), 96 U.S. 627, 24 L. Ed. 858 16

City of Omaha *v.* Omaha Water Co. (1911) (C.C.A.8), 192 Fed. 2d 246 16

First Savings Bank & Trust Co. *v.* Stuppi (1924) (C.C.A.8), 2 Fed. 2d 822 16

In Re Brose (1918) (C.C.A.2), 254 Fed. 664 16

Lynch *v.* U. S. (1934), 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 17

Pierce *v.* U. S. (1869), 7 Wall 666, 19 L. Ed. 169 17

Thomson Machine Works *v.* Lake Tahoe Marine Supply Co., (1955) (N. Dist. Calif.), 135 Fed. Sup. 913 11

U. S. *v.* Ansonia (1910), 218 U. S. 452, 31 S. Ct. 49, 54 L. Ed. 1107 13

U. S. *v.* The Bank of Metropolis, 15 Pet. 377, 392, 10 L. Ed. 774 17

U. S. *v.* Smoot (1873), 15 Wall 36, 21 L. Ed. 1071 17

Statutes:

1. Defense Production Act of 1950, Sections 2062, 2092, 2093, Title 50 U.S.C.A. War and National Defense 3
2. Arkansas Miners' Lien Statute, 5 Ark. Stat. (1947), Sections 51-701—51-704 3
3. U.S.C.A., Title 28, Section 1652 3-15

Miscellaneous:

1. U. S. Congressional Service, Vol. 2, 2nd Session, 81st Congress, 1950 10
2. U. S. Congressional Service, Vol. 2, 1st Session, 82nd Congress, 1951 10

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CROW-BURLINGAME COMPANY — *Petitioners*

v.

UNITED STATES OF AMERICA — *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherill, Mill and Mine Supply Company and Crow-Burlingame Company, pray that a writ of certiorari be issued

to review the Final Judgment of the Court of Appeals for the Eighth Circuit entered on the 26th day of June, 1957, in the case of *United States of America* v. *Latrobe Construction Co., et al*, No. 15547 on the docket of that Court.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of Arkansas is reported in 134 Fed. Sup. 898 to 950 (R.172-231). The Opinion of the Court of Appeals for the Eighth Circuit (Appendix A, infra, pages A-2 to A-17) is reported at ..... Fed. (2) .....

JURISDICTION

The Judgment of the Court of Appeals was entered on June 26, 1957 (App. A-17) and Motion for Rehearing was denied on August 7, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

The Court of Appeals reversed the holding of the District Court that the Petitioners herein were entitled to priority in a mortgage foreclosure action brought by the Government. The trial court ruled that the Petitioners' mining lien claims established under the laws of Arkansas were superior to the claims of the Government claiming under an after-acquired property clause in its mortgage (R.214-218). The Court of Appeals held that the Government had secured a "contractual" lien by virtue of its letter contract with the mortgagor and that under Federal law the "contractual" lien was superior to the statutory liens of the Petitioners under Arkansas law (App. A-1 to A-16). Thus the following questions are presented to this Court:

(1) Does the Defense Production Act of 1950, Act September 8, 1950, C 932, 64 Stat. 798, as amended, authorize a contracting officer of the Government

to create a "contractual" lien that is superior to a state statutory lien of mining lien claimants who were not parties to the contract between the Government and the party for whom the mining lien claimants furnished materials and labor?

(2) In the event that an affirmative answer is given to point (1), does the letter contract between Westmoreland Manganese Corporation and the Government clearly show that the lien of the Government was to be superior to the statutory lien of the contractors for labor and material?

(3) In the event that points (1) and (2) are both answered in the affirmative, then the question is whether or not the Government may prevail under an after-acquired property clause in its mortgage over the statutory miners' liens of the contractors when the mortgagor's title or improvements are created by the material sold or labor performed by the mining lien claimants?

(4) It being clear that under Arkansas Statutory Law and the decisions construing that law, the claimants' miners liens are superior to the Government's mortgage lien the question is presented, as to whether or not the Government in its contracts with its citizens is bound by the terms of § 1652 Title 28, U.S.C.A.?

STATUTES INVOLVED

The pertinent provisions of the Defense Production Act of 1950, Act September 8, 1950, c932, 64 Stat. 798, are as follows:

Sections 2062, 2092, 2093 of Title 50, United States Code Annotated, War and National Defense — Appendix B-1 to B-4.

Arkansas Miners' Lien Statute (5 Ark. Stat. 1947)—

Sections 51-701—51-704 Appendix B-4 and B-5.

United States Code Annotated, Title p. 28, Section 1652, B-6.

STATEMENT

On April 7, 1952, the United States, acting through the Defense Procurement Agency, addressed a letter to the Westmoreland Manganese Corporation, Batesville, Arkansas, in which it proposed to enter into a contract with Westmoreland "which will provide for production" of 264,000 tons of manganese, production to begin not later than 12 months from the date of your acceptance of this order (R.22-35).

This "order" was accepted by Westmoreland on April 7, 1952, and became the basic contract between the Defense Procurement Agency and Westmoreland. The contract provides that

> (d) For the purpose of assisting Westmoreland in the performance of its obligations under the contract, the government agreed to advance to Westmoreland on its written request from time to time as needed by Westmoreland for
>
> > "developing, equipping, preparation and operation of the aforesaid facilities, including working capital, completion of land purchase, and the acquisition and installation of new facilities, for the mining, production and processing of the ore called for hereunder" (R.23).
>
> sums of money up to a total of $3,807,250.00. Of this amount up to $2,788,650.00 was to be used for acquisition and completion of new facilities; $418,600.00 to pay off the balance owed on mining properties; and $600,000.00 for working capital.

This basic contract, prepared by the Defense Production Agency, further required Westmoreland to put its plant in condition to produce the manganese, and to contract for and make commitments for such supplies and

services as might be necessary therefor. That provision of the contractor is as follows:

> "Upon your acceptance of this order you will proceed without delay with the development, equipment and preparation of the above-named property for the production of manganese ore at the rate required to meet your obligations hereunder, including but not restricted to the installation of a washing and concentrating plant of 6000 long tons per day capacity, *the construction of necessary roads, the procurement* of required mining and hauling equipment, and necessary related facilities for the production and processing of manganese ore, *and you will make such contracts and commitments for supplies and services as are necessary therefor*" (R.23) (emphasis supplied).

The contract further provided that the Government should have the right to have its representative at the work site and to have access to the books and records of Westmoreland, to audit same, and to observe all its operatives.

The contract provided that Westmoreland

> "should furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you which will be fully paid for through the advance of funds by the Government as prescribed or approved by the Government" (R.30),

and that the Government should have a paramount lien upon the credit balance in the special account set up from advance payments made by the Government.

On May 22, 1952, Westmoreland executed a "Real Estate and Chattel Mortgage" to the United States of America upon all of its lands in Independence and Izard Counties, Arkansas, and upon the furniture, fixtures, machinery and equipment *as then owned*, and upon such furni-

ture, etc., "and all other personal property hereafter acquired". This mortgage was given to secure a note of Westmoreland to the Government of $3,807,250.00.

The mortgage provided that the mortgagor

> "will not create or permit to accrue any debt, lien or charge on said premises which would be prior to or on a parity with the lien of this mortgage; that the mortgagor will prevent any debt, lien or charge from affecting the rights of the mortgagee" (R.41-42).

The Mortgagor waived all the benefits of valuation, appraisement, homestead exemption, stay, redemption and moratorium laws of the State of Arkansas (R.45).

On the same date, May 22, 1952, a Supplemental Mortgage was executed by Westmoreland for the purpose of making more explicit the descriptions of the properties covered by the original mortgage. This supplemental mortgage described the lands as located in Independence and Izard Counties, Arkansas, and it included after-acquired personal property.

As to after-acquired property the Supplemental Mortgage provided that "to the end that such future acquisitions may be encumbered under instruments more specifically describing the same", the mortgagor would from time to time and as requested by the mortgagee execute aditional instruments on forms to be approved by the mortgagee, as might be necessary to encumber such additional acquisitions under more specific description (R.50).

Section IV of the Supplemental Mortgage is as follows:

> "It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the

proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statuory lien" (R.51).

After the execution of the two mortgages the Government advanced moneys to Westmoreland and Westmoreland proceeded with building and equipping the mining plant on its propery in Independence County, Arkansas. The work progressed until the project was about ¾ completed, when, for reasons not material here, the Government refused to make further advances to Westmoreland. This was in the early part of 1953. Westmoreland then shut down mining operations and halted further work on the plant and other mining facilities. At the time the Government refused to make further advances to Westmoreland there was on deposit in the bank account from moneys advanced by the Government against commitments made by Westmoreland the sum of $119,000.00, which the Government quickly withdrew.

In compliance with the requirement made in the contract prepared by the Government, Westmoreland made "such contracts and commitments for supplies and services" as were necessary for building a beneficiation plant and equipping and preparing the property for the production of manganese. The contracts made by Westmoreland, under this requirement of the basic contract, with the Petitioners here, form the basis of their claims for supplies, equipment and services.

When Westmoreland shut down all of the Petitioners here filed their lien claims against Westmoreland property

pursuant to the provisions of Arkansas lien laws. No question is presented here as to the correctness of any of the claims and the amounts thereof, as neither the Government nor Westmoreland disputed the validity or amounts of the lien claims (R.251).

On January 8, 1954, the Government filed its action against Westmoreland to foreclose its mortgages in United States District Court by virtue of Section 1345, Title 28, U.S. Code, and see Sec. 2156 (b), Title 50, App., U.S. Code (R.1-55). The material lien claimants were made defendants. They answered to the Complaint setting up the amounts of their claims for material and services, the filing of their liens as required by the Materialmen's—Miners' Lien Laws of the State of Arkansas and asserted that under such laws their Miners' Liens were superior and paramount to and over the mortgage lien of the government (R.56-135).

The case in the District Court was tried and briefed by the Government on the premise that the issue as to priority of the respective liens of the Government and the creditor lien claimants was a matter of Arkansas statutory law, and governed and controlled by the decisions of the Arkansas Supreme Court (R.214). The District Court held that the law of Arkansas was the applicable law and held in favor of the lien creditors, decreeing that the statutory liens were superior to the mortgage liens. In the decree the trial Court found that there was a quantity of material furnished by the lien claimants which was in the warehouse unused and gave the lien claimants who furnished those materials a first lien on such material to the extent of their invoice value. Otherwise the liens were decreed against the buildings, plant, etc., for which the material and labor were supplied. The memorandum opinion of the District Court relative to priority of credi-

tors' claims is given at length at pages 172-231 of the Government's Record on Appeal to the Court of Appeals, and the decree of the trial Court is found at pages 213-246 of said Record.

The Government appealed and the Court of Appeals for the Eighth Circuit reversed, holding that the applicable law is the Federal Common Law and that under the Federal Law the Government's mortgage lien was the superior lien.

REASONS FOR GRANTING CERTIORARI

POINT I

This Court has not passed upon the Defense Production Act of 1950 or any similar Act of Congress under which a Federal Agency, although not given an express statutory lien, claims priority on the ground that a contracting officer is allowed to provide for a prior lien even as against third parties on the basis that the statute provides that loans may be made "on such terms and conditions as the President deems necessary."

The decision of the Court of Appeals holds in substance that although admittedly the Defense Production Act did not create a statutory lien, giving the Federal Agency priority, that it does authorize the contracting officer to contract that the Government mortgage will be superior to all other liens including statutory liens of third parties. This creates a situation whereby it is a better policy for the Government not to have an express statutory lien as the Government would be limited in the scope and application of the lien by the statute but a contracting officer is not subject to any such restrictions under the theory advanced by the Court of Appeals.

We have found no reported cases construing this provision of the Defense Production Act of 1950. We have found no executive orders or directions under this Act that authorized or directed the contracting officer to provide for a lien that is superior to the liens of third parties, who have not in any way contracted with the Government. The legislative history of Defense Production Act of 1950 is found on pages 3620 to 3659 of Vol. 2, U.S. Code Congressional Service for the 81st Congress, second session, 1950, and the legislative history for the amendments of 1951 to this Act are found on pages 1584 to 1675 of Vol. 2

of U.S. Code Congressional Service for 82nd Congress first session 1951, and there is no mention of any congressional policy or intent to create or authorize any lien that is superior to the valid liens of third parties.

It is important that this question be decided by this Court in view of the fact that the Court of Appeals decision will be accepted as authority that any government procurement officer has the power by contract to create a lien in favor of the Government and that the lien so created will be superior to a valid statutory lien of third parties. The Court of Appeals decision creates a situation whereby the Government will prevail over innocent third parties even though the third parties search the statutes to determine if an express statutory lien is created, and even though they search the Federal Register to determine if an executive order granting lien has been issued under the statute, and in both instances determine that no such authority has been given. The lien can be a secret lien as the federal government is not bound by state recording statutes. "From the view point as a legal precedent, the decision of the Court of Appeals constitutes a new and sweeping expansion of the Law of Contracts, for never before has it been held that a person who is not a party to a contract can be divested of statutory rights simply by a recital in the contract that such statutory rights shall not apply. Under this decision, all persons who supply labor or material to anyone who, in turn, has a contract with the Government must do so at their peril and at the risk that the Government contract will deny to them valuable rights given by State Law to enforce a lien upon the product of their labor or material. This issue is one that should be decided by this Court."

In the lower Court the Government admitted in its brief that the only case it knew of on this point was *Thomson Machine Works* v. *Lake Tahoe Marine Supply Co.*, 135

Fed. Supp. 913 (Northern District of California, 1955). This case does not reach the issue involved here as it is based upon a statute, 34 U.S.C.A., Par. 582, which statute was construed to create an express statutory lien and the issue was not between the mortgage and the construction lien claimants but involved the passing of title and also the Court expressly did not reach the point of the priority of liens under the progress payments clause of the contract.

We submit that no superior lien is authorized under this Act insofar as third parties are concerned and that when Congress intended for third parties to be given an inferior lien position it has created an express statutory lien in favor of the Government.

POINT II

Assuming that the Defense Production Act permitted a contractual lien to be contracted for by the Government, there is no convincing proof that the contract involved herein so provided. The contract involved herein is a letter written to Westmoreland Manganese Corporation by the Defense Materials Procurement Agency and accepted by Westmoreland's President and the pertinent provisions of the contract recognizing the possibility of claims superior to that of the Government are found in the Statement of the case.

There was a further recognition on the part of the Government and its Counsel that liens of construction claimants might well be superior to the lien of the Government. This is evidenced in a letter from Mr. Harry E. Meek, a special counsel for the Government, in his letter to the Defense Materials Procurement Agency under date of June 19, 1952. In closing his letter the following statement is found:

"Therefore, I think that it would be advisable if, in connection with each future disbursement, some precaution is taken by the Government to protect itself against currently accruing construction liens. Most certainly the Government's mortgage might fail as against removable installations of machinery which had been purchased under conditional sales contracts" (Supp. R.11).

The leading case on the question of whether or not there has been a recognition on the part of the Government of liens that would be superior to the liens of the Government is *United States* v. *Ansonia Brass & Copper Co.*, 1910, 218 U.S. 452; 31 S. Ct. 49; 54 L. Ed. 1107. It is clear that the above mentioned sections of the contract and the mortgage and the statement of Government's own counsel show a clear recognition that there were possible lien claims of third parties and that these lien claimants might well be held to have had claims superior to the Government's. It is interesting to note that a specific lien was created upon the bank deposit but there was no specific provision in the contract that the mortgage was to be a specific lien over and above all other lien claims. Thus tested by the Ansonia decision, it is clear that the Government did not provide for a lien that would be superior to the lien of the Petitioners and the decision of the Court of Appeals is in conflict with the Ansonia case.

POINT III

The decision of the Court of Appeals is in direct conflict with the case of *Bear Lake & River Water Works & Irrigation Co.* v. *Garland*, 164 U.S. 1; 17 S. Ct. 17; 41 L. Ed. 327, as to the question of priority of lien between the mining lien claimants and the lien arising out of an after-acquired property clause in the mortgage. *Bear Lake & River Water Works & Irrigation Co.* v. *Garland*, *supra*, holds that a mortgage containing an after-acquired prop-

erty clause is not a valid encumbrance upon after-acquired property superior to that of a contractor's lien when the mortgagor's title is created by the contractor's labor and is acquired with the burden of the lien which attached simultaneously with the title to the mortgagor. The holding of the court below is in direct and complete conflict with the Bear Lake case. It is our position that where a mortgagee relies upon an after-acquired property clause in its mortgage that the mortgagee can never acquire title in a foreclosure suit that is superior to the title of the mortgagor and where the title to the mortgagor is burdened with the statutory lien at the time of the acquisition of the property, or at the time of the erection of the improvements, the holder of the statutory lien prevails under both Federal and Arkansas law.

The District Court followed the Bear Lake case and rejected all of the Government's contention and this problem was the only problem that the Government considered to be of serious consequence in the District Court in its final brief. The lower court's full discussion of the equitable issues involved is found on page 214 of the Record in this case.

The Court of Appeals did not discuss this issue but even assuming for the purpose of argument that the Defense Production Act of 1950 authorized a lien, or that a contractual lien was made, the issue still remains whether the lien would cover after-acquired property.

The Court of Appeals recognized that the District Court decision on Arkansas law was a permissible conclusion under Arkansas law. This is important in that it is indisputable that Arkansas law governed the title to Westmoreland's property, acquired by Westmoreland as a result of the improvements constructed or furnished by the lien claimants. It is clear that Westmoreland in its

dealings with these appellants was governed by Arkansas law and if this be true then the title which Westmoreland had to pass to the Government under the after-acquired title provision of the mortgage was strictly a matter of Arkansas law. The net result of the decision of the Court of Appeals was to give the Government a title that was free of a valid lien under Arkansas law and this decision should be presented to this Court for review, in view of the fact that for over 50 years the Bear Lake case has been the law of the land on the subject of priority of liens.

POINT IV

Certiorari should be granted because the decision of the Court of Appeals is in direct conflict with an Act of Congress, 28 U.S.C.A. 1652, regarding rules of decision as to applicability of the laws of the several states, and is also in conflict with the decisions of this Court.

In basing its decision upon Federal law and in holding Federal law as the applicable law in this case, the Court of Appeals evidently overlooked the provisions of Title 28 U.S.C.A. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

This section was orginally § 34 of the Judiciary Act of 1789 and has been in full force and effect ever since. The Act of Congress under which the Government contracted with Westmoreland, as has been shown, does not give the Government a lien of any kind, so we do not have an Act of Congress as over-riding the Arkansas Miners' lien law.

"In cases where they apply!"

The Courts of the United States have held many times that the title and disposition of property, personal and real, are governed by the *lex sitae*. The property involved in this case consisted of building material, electrical equipment and supplies "in place", and part in the warehouse in original *packages*. The material "in place" partakes of the nature of land or real property; that in the warehouse, personalty.

We refer the Court to some of these decisions:

In *First Savings Bank & Trust Co.*, v. *Stuppi*, 2 F. (2d) 822, the Circuit Court of Appeals, 8th Circuit, held:

> "In construction of mortgages the local state law governs."

In re Brose, 254 Fed. 664, the Court held:

> "The mortgage, the meaning of which is involved here, is a New York mortgage and if the New York Courts have determined its meaning this Court must give the same meaning to its words which would be given to them by the Courts of that state."

In the case of *City of Omaha* v. *Omaha Water Co.*, 192 Fed. 246-249, the Eighth Circuit Court of Appeals again held that:

> "The decisions of the Supreme Court of Nebraska concerning the nature and extent of the estate or rights of mortgagees in mortgaged property are controlling upon us."

In *Brine* v. *Hartford Fire Ins. Co.*, 96 U.S. 627; 24 L. Ed. 858, this Court held the following proposition to be sound:

> "And that all laws of a State existing at the time a mortgage or any other contract is made which affect the rights of the parties to the contract, *enter*

into and become a part of it and are obligatory on all courts which assume to give remedy on such contracts" (emphasis supplied).

Petitioners contend that the Arkansas Miners' lien law which gives the petitioners' liens superiority over the mortgage lien of the Government, under the doctrine approved by this Court in the Brine case, *supra*, and which law was in full force and effect at the time tl. Government took its mortgage as security for its loan to Westmoreland, the said Arkansas statutory lien law was written into and became a part of that mortgage.

The Arkansas law and the decisions of the Arkansas Supreme Court formed the applicable law and the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

But the Government in this case may contend it is the "Government" and should not be held to the rules regulating transactions between individuals. This Court has held in numerous cases that when the Government conducts business affairs and enters into contracts with its citizens it is subject to and its rights are governed by the same laws as private individuals would be under the same circumstances. Cases so holding are:

The United States v. *The Bank of Metropolis*, 15 Pet. 377, 392; 10 L. Ed. 744.

Lynch v. *United States*, 292 U.S. 571; 78 L. Ed. 1434.

Pierce v. *The United States*, 7 Wall 666; 19 L. Ed. 169.

Headnote 1 to *United States* v. *Smoot*, 15 Wall 36, 21 L. Ed. 107, is as follows:

"This Court will not apply to contracts made by the Government, nor give to its action under such contracts, a construction and an effect different from those

which Courts of Justice apply to contracts between individuals."

In *Lynch* v. *United States, supra,* this Court said:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

In this case we have never contended that the Government did not have a first lien on Westmoreland's interest in the property, but that Westmoreland's title to the property in question was burdened with petitioners' miners' liens from the moment the material was delivered to Westmoreland and that the Government by a contract with Westmoreland could not destroy those liens, or take the mortgaged property free of those liens.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF APPEALS

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,547

United States of America,
Appellant,

v.

Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas. Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill and Mine Supply Company and Crow-Burlingame Company,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

Decided June 26, 1957

Before WOODROUGH, VOGEL and VAN OOSTERHOUT, Circuit Judges

I. *Opinion of Court of Appeals*

VAN OOSTERHOUT, Circuit Judge.

In a mortgage foreclosure action brought by the United States against Westermoreland Manganese Corporation, hereinafter called Westermoreland, judgment was entered against Westmoreland in favor of the United States for $3,508,943.26, and sale of the mortgaged property was ordered. We have affirmed this judgment as to Westmoreland in an opinion filed this date. *Westmoreland Manganese Corporation* v. *United States*, 8 Cir., . . . F.2d. . . .

The trial court in a well prepared opinion, reported at 134 F. Supp. 898, 917, sets out in detail the facts pertinent to this appeal and his solution of the legal problems. We shall not encumber this opinion by setting out the complicated facts so well stated by the trial court.

The Government appeals from the court's determination that appellees,* who claimed miners' liens** under Arkansas mortgages as to such improvements erected upon the mortgaged property which had become appurtenant to the land. The Government also appeals from the court's determination that individual miners' lien claimants who had furnished identifiable particular items of personal property which had been delivered to Westmoreland but had not been incorporated into the improvements so as to become law for improvements erected upon the mortgaged premises subsequent to the date of the Government's mortgages, had liens prior to the lien of the Government, appurtenant to the land were entitled to priority with re-

* The creditor-defendants other than appellees either held judgments against Westmoreland or were unsecured creditors. Their claims were held to rank below the claims of both the Government and the appellees in all respects. Since the creditors other than the appellees have not prosecuted an appeal, their claims require no discussion or consideration.

** The miners' liens are claimed under Arkansas Statutes, Sec. 51-701 et seq. The applicable statutes are quoted in full in the trial court's opinion, 134 F.Supp. 898, 930-931.

spect to such property as against the Government's mortgage lien. The appellees were made parties below and had filed crossclaims.

Jurisdiction is established under 28 U.S.C., § 1345, and jurisdiction is also asserted under 50 U.S.C., Appendix, § 2156(b).

The court directed the manner of sale of Westmoreland's property. The total sale brought $1,348,551.19, which includes proceeds of $319,489.79 for the property upon which appellees were held to have a prior lien. The property upon which appellees were given a prior lien was separately sold, with the right and obligation on the part of the purchaser to remove such property.

The court held against the appellees upon many of the contentions raised by their pleadings, including appellees' claims that the Government's mortgages were void for indefiniteness, that the Government was a joint venturer with Westmoreland, that creditors were third party beneficiaries of the Government-Westmoreland contract, and that equitable considerations barred the Government's priority claim.

The mortgages involved in this case were given as security for Government funds advanced Westmoreland pursuant to the provisions of the Defense Production Act of 1950, 50 U.S.C., Appendix, § 2061 et seq. This act contains a broad declaration of policy and gives the President or his delegate broad powers to maintain the military and economic strength of the nation. Section 2092 authorizes loans to private business to expedite production of materials for national defense, including the mining and development of strategic and critical metals and minerals. "Such loans may be made without regard to the limitations of existing law and on such terms and conditions as the President deems necessary • • •." The Treasury is

required to furnish the funds necessary to make the authorized loans. It was pursuant to this authority that the loan of the funds of the United States was made to Westmoreland.

Westmoreland is a Maryland corporation authorized to do business in Arkansas. The United States, acting through the Defense Materials Procurement Agency, an authorized representative of the President, entered into a contract with Westmoreland on April 7, 1952. Under such contract the Government agreed to purchase manganese ore, upon specified terms, which was to be mined from the ore deposits owned by Westmoreland and processed in a washing and concentrating plant to be constructed within a year on the Westmoreland property. To assist Westmoreland in this undertaking the Government agreed to advance $3,807,250 for land acquisition, construction, and working capital. The contract provides in part:

> "(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.
>
> "(d) The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets."

The Real Estate and Chattel Mortgage executed and delivered to the United States on May 22, 1952, states among other things:

> "This mortgage shall constitute a first lien on the mortgaged property.
>
> * * * * * * * *

"That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof."

A supplemental mortgage, also dated May 22, 1952, contains the following provision:

"It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien."

These mortgages were properly executed and recorded before construction was commenced by Westmoreland on its new facilities and before any lien now asserted by the appellees attached.

The Government in its brief urges that the court erred in determining the priority of lien issue upon the basis of Arkansas law; that the federal law applies; and that the Government's rights under its contract lawfully entered into can not be affected or limited by provisions of state law. The Government additionally asserts that under Revised Statutes, section 3466, 31 U.S.C., section 191, it is entitled to priority in payment. The appellees contend that the Government did not raise these issues in the trial court and can not adopt a new theory upon appeal.

The Government in its petition sets out in full the contract and mortgages relied upon, and states that they were entered into by the United States pursuant to the provisions of the Defense Production Act of 1950. Priority of the Government mortgages over the appellees' liens is asserted. The Government prays that a first, prior, and paramount lien be established in its favor against the mortgaged property. Appellees, in their answers and crossclaims, deny that their liens are subsequent to the Government's mortgage lien, and assert that their liens are prior to the mortgage lien under the Arkansas Miners' Lien statutes. The Government in its reply denies that appellees have any miners' lien which is superior to the lien created by the Government's prior mortgages.

The trial court recognized that it was necessary to decide what law applies. He determined that Arkansas law controls. It is perhaps entirely true, as contended by appellees, that the argument below was devoted largely to the issue of whether the miner's liens were prior to the mortgage lien under Arkansas law. Doubtless, the trial court did not have the benefit of the briefs furnished this court on the contention that federal law applies. However, the Government, in its reply brief filed here, does set out a brief filed in the trial court on July 22, 1954, in opposition to a motion to dismiss its petition filed by Westmoreland wherein the Government states in part:

> "Before mentioning the merits of defendant's motion, it should be pointed out that in construing contracts executed by the United States of America, particularly those with reference to land, the applicable law is Federal, rather than State. *United States* v. *Allegheny County*, 322 U.S. 174, 182; *Girard Trust Co.* v. *United States*, 149 F.2d 872, 161 F.2d 159 (C.C.A. 3, 1947); *Brooklyn Waterfront Terminal Corporation* v. *United States*, 70 F.Supp. 943, 948 (C.Cls. 1950). • • •"

Appellees contend that this brief was filed with reference to a controversy between the Government and Westmoreland. The factual statement is doubtless correct. Nevertheless, the contract and mortgages involved in Westmoreland are the identical instruments that are involved in the present controversy.

At least to the extent of the issues raised by the pleadings the court is bound to apply the appropriate law. *United States* v. *Certain Parcels of Land in City of Philadelphia et al.*, 3 Cir., 144 F.2d 626, 630; *Ettman* v. *Federal Life Ins. Co.*, 8 Cir., 137 F.2d 121, 127. In the case last cited the trial court relied upon a Missouri statute which this court found to be inapplicable. This court determined the situation was governed by the common law of Missouri. The court states (p. 127):

> "• • • These rules contemplate that every litigant shall have a trial of his case upon its merits and in accordance with the evidence and the applicable law. Whether the Company assumed in its pleadings and upon the trial that it must prove an intent on the part of the insured to deceive is of no consequence. The evidence received was within the issues made by the pleadings, and it was the duty of the trial court to apply the proper rules of law to the fact situation. • • •"

In *United States* v. *Certain Parcels of Land in City of Philadelphia, et al., supra*, the trial court applied the law of Pennsylvania in a Government condemnation case. Upon appeal appellee urged that the case below was tried upon the theory that Pennsylvania law applied, and that appellant could not reply upon a different theory as to controlling law upon appeal. This argument was rejected by the court of appeals. The court states (p. 630):

> "• • • Appellate courts of course have always remanded cases when the trial courts have applied the law of the wrong jurisdiction. *Klaxon Co.* v. *Stentor*

Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. We think this should be done in this case and it is immaterial that it was tried in the district court on the theory that Pennsylvania law was to be applied. The appropriate law must be applied in each case and upon a failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the appropriate law, even if the question was not raised in the court below. * * *"

We are satisfied that under the pleadings in the present case the court was bound to apply the right law, and that the issue of whether federal common law or Arkansas law should be applied was before the trial court.

An additional problem is raised by the Government's contention that it is entitled to priority under R.S., section 3466. The Government does not plead all of the facts necessary to bring it under the provisions of this statute. The Government apparently relies upon the appointment of the receiver as the act of bankruptcy on the part of Westmoreland which brings the statute into operation. This was not and could not have been pleaded in the original petition as the receiver was subsequently appointed pursuant to the prayer of the Government's petition. The petition was not amended to assert an act of bankruptcy. The Government in its pleadings did not specifically request priority by reason of R.S., section 3466. An appellate court may, in its discretion, in the public interest or in order to prevent a miscarriage of justice, consider an issue not raised in the trial court. *Helvering* v. *Hormel*, 8 Cir., 111 F.2d 1, affirmed 312 U.S. 552, 557; *United States* v. *Harrell*, 8 Cir. 133 F.2d 504, 507; *Frieze* v. *West American Ins. Co.*, 8 Cir., 188 F.2d 331, rehearing denied 190 F.2d 381; *Federal Deposit Insurance Corporation* v. *Vest*, 6 Cir., 122 F.2d 765, 768. The power to consider issues not raised in the trial court should be sparingly exercised. Whether we should exercise such

power here in connection with the Government's assertion of priority under 3466 presents a close question. We find it unnecessary to determine this issue because of the result reached in the determination of other issues before us for consideration.

We believe that the priority of the liens involved in this appeal should be determined by federal law. Article I, section 8 of the Constitution of the United States, gives Congress power to provide for the common defense and general welfare of the United States, and to make all laws necessary and proper to carry into execution powers vested by the Constitution in the Government of the United States or any department thereof. Article VI provides that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land. See *United States* v. *Allegheny County*, 322 U.S. 174, 182. Clearly, Congress was acting within its constitutional power in enacting the Defense Production Act of 1950. This act authorizes the President or his representative to make loans to private businesses to expedite the procurement of strategic materials for national defense. Congress authorized such loans to be made upon such terms as the President deemed necessary. As heretofore set out, the contract and mortgages specified that the Government should have a paramount lien on Westmoreland's assets.

In the *Allegheny case*, *supra*, the Supreme Court of Pennsylvania had held that Pennsylvania could levy ad valorem taxes on personal property title to which was in the Government and which property had become attached to the taxpayer's realty under a Government contract. The Supreme Court reversed, stating in part (p. 183):

> "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid

the introduction of disparities, confusion and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * *"

In *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, the United States sued the bank to recover proceeds of a check it had paid the bank. It was established that the endorsement of the payee, a W.P.A. worker, had been forged. The United States District Court applied the law of Pennsylvania and held for the bank. The court of appeals reversed, 130 F.2d 93, holding that federal rather than state law should be applied. The Supreme Court affirmed, stating (pp. 366-367):

"We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. * * * The duties imposed upon the United States and the right acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick* v. *Greaney*, 309 U.S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447. In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

In *United States* v. *Standard Oil Company of California*, 332 U.S. 301, the Government sued a truck driver for damages caused the Government by reason of injuries inflicted upon a soldier as the result of the truck driver's negligence. The question of whether under such circumstances

federal or state law controlled is thoroughly discussed. It is stated that the great object of *Erie* v. *Tompkins*, 304 U.S. 64, was "to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits." The Court continues (pp. 307-308):

> "Conversely there was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature. The diversity jurisdiction had not created special problems of that sort. Accordingly the *Erie* decision, which related only to the law to be applied in exercise of that jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings. Cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. at 366-368. Hence, although federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.
>
> "In this sense therefore there remains what may be termed, for want of a better label, an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision,' outside the constitutional realm, untouched by the *Erie* decision. * * *"

In our present case the Government, under the statute authorizing the loan, had authority to prescribe the conditions of the loan. Pursuant to such authority the Govern-

ment contracted for and obtained a prior and paramount lien upon Westmoreland's property, including such improvements as might be subsequently erected. As heretofore pointed out, the mortgages provide that the Government's lien is to be prior to the lien of any mechanics, materialmen, or labor or any other statutory lien. The Government's mortgages were executed and recorded before any labor or material was furnished by any of the appellees. Consequently, at the time appellees entered into contracts with Westmoreland for labor and materials, they had constructive notice of the terms of the Government's mortgages. This fact may not be of any particular significance in the determination of this case, but it is an answer to the equitable claims of the appellees. The validity of the Government's mortgages in all respects has been confirmed by the judgment that has been entered. The Government, by virtue of a valid contract, authorized by the Constitution and statutes of the United States, bargained for and obtained a paramount lien upon Westmoreland's property. We can see no reason why the Government should not be in as good a position under a valid contractual lien as it would be under a lien created by statute.

The federal courts have had occasion, in connection with cases arising under the priority granted by 3466, to discuss what type of lien will defeat the priority granted the Government by such section. To avoid confusion we state that we are not basing our decision in the present case in any way upon the provisions of 3466, but are citing cases decided under such statute merely for the purpose of illustrating the status given to state liens by federal courts. In *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, the issue was whether, in a state court proceeding under a general assignment for the benefit of creditors, section 3466 gives priority to the claim of the United States over a landlord's lien and a municipal tax lien.

The Supreme Court states that it is not expressly decided whether the Government's 3466 priority could be defeated by a specific and perfected lien upon the property at the time of insolvency or voluntary assignment, and again finds it does not reach that problem since it is satisfied the asserted liens are not specific and perfected. The Virginia court had held in effect that the liens were specific and perfected. In reversing the Supreme Court states (pp. 356-357):

> "• • • But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority. • • •"

The Court then holds that under federal law the liens are not specific and perfected but are merely caveats of a more perfect lien to come. See also *County of Spokane, Washington* v. *United States*, 279 U.S. 80; *Illinois* v. *Campbell*, 329 U.S. 362; *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361. Professor Frank R. Kennedy, in an article in 63 Yale Law Journal 905, after discussing numerous cases arising under section 3466, states (pp. 918-919):

> "The remarkable progeny of *Spokane County* subordinated statutory liens to the federal claim, even though the Government had no lien. The condemned category of the inchoate and general lien, created by the Court and continually enlarged to include each new lien coming before it, has come to embrace practically every lien to be found in modern American law. And in order to avoid facing the supposedly unresolved question whether a specific and perfected

lien is superior to the federal priority, the Court has always been successful in finding one feature suggestive of inchoateness. * * *"

Section 3670 of the Internal Revenue Code of 1939 provides for a lien in favor of the United States for taxes. This statute does not in terms confer priority upon tax liens. *United States* v. *New Britain*, 347 U.S. 81, 84. In *United States* v. *Acri*, 348 U.S. 211, the issue was the relative priority between an attachment lien and a 3670 tax lien. The district court and the court of appeals found the attachment lien to be prior. The Supreme Court reversed on the question of the applicable law. The Supreme Court says (p. 213):

> "The relative priority of the lien of the United States for unpaid taxes is, as we said in *United States* v. *Waddill Co.*, 323 U.S. 353, 356, 357; *Illinois* v. *Campbell*, 329 U.S. 362, 371; *United States* v. *Security Trust Co.*, 340 U.S. 47, 49, always a federal question to be determined finally by the federal courts. The state's characterization of its liens while good for all state purposes, does not necessarily bind this Court. * * *"

See also *United States* v. *Security Trust Co.*, 340 U.S. 47, 49.

United States v. *White Bear Brewing Co.*, 7 Cir., 227 F.2d 359, involved a determination of the question of priority between a mechanic's lien and a tax lien. In that case the work had been completed, the mechanic's lien had been filed in the manner required by state law, and proceedings for the foreclosure of the lien were commenced before the assessment list was received by the collector and before the assessment was made and notice thereof filed. The court of appeals, in a carefully considered opinion, held the mechanic's lien claimant entitled to priority over the tax lien. The Supreme Court reversed without

opinion. 350 U.S. 1010. The effect of the reversal was to determine the tax lien to have priority over the mechanic's lien. See dissenting opinion, *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010. To the same effect see *United States* v. *Colotta*, 350 U.S. 808.

The decisions of the Supreme Court heretofore discussed appear to establish quite definitely that a federal priority or federal lien will prevail over any lien that is not specific and perfected. The Supreme Court has uniformly held that, as against federal priorities or liens, the question of whether the lien asserted against the Government claim is specific and perfected is always a federal question. In *White Bear Brewing Co.*, *supra*, much more was done in the way of perfecting the labor and materialman's lien than was done in the present case. There the work had been completed, the lien had been filed, and foreclosure had commenced before the Government tax lien was asserted. In our present case no materials had been delivered or work performed until after the Government's mortgages had been executed, delivered and recorded.

The Government also urges that the court erred in determining that under Arkansas law the miner's liens are superior to a prior mortgage lien, and also in determining that the miner's lien statute is applicable under the facts in this case. The court's opinion discloses that he has made a careful and exhaustive study of the applicable Arkansas cases, and it is very probable that he reached a permissible conclusion on the basis of Arkansas law. The court frankly states that his decision is based upon Arkansas law. He also states (p. 942):

> "* * * The priority of a mechanic's lien under Arkansas law, however, does not depend upon the quality of the lien as 'choate' or 'inchoate', but rather upon the time at which the lien attaches, which is when the first materials are furnished. * * *"

The trial court erred in determining the priority issue before it on the basis of Arkansas law rather than upon the basis of federal common law as developed by the Supreme Court of the United States in the cases we have heretofore discussed.

The question remains as to whether this case should be remanded to the trial court for the purpose of taking additional evidence and for additional fact determinations. In *Frieze* v. *West American Ins. Co.*, *supra*, the test to be applied in the event new issues are considered by the appellate court is stated as follows (p.382):

> "* * * Where such new issues are considered by the appellate court, the case will be remanded for decision, by the trial court, of any uncertain or disputed facts related to such issues. Where the new issues involve undisputed facts, the appellate court may reverse and remand with directions to the trial court to proceed in accord with the decision of the appellate court."

As heretofore stated, we doubt whether the question of what law is applicable is a new issue. In any event, the application of the foregoing test to the record in this case satisfies us that the evidence relative to the priority of the respective liens was fully developed in the trial court, and that there is no occasion to remand this case to the trial court for further testimony or fact findings.

We are satisfied that under federal law the appellees' miner's liens were inchoate and were not specific and perfected at the time the lien of the Government mortgages attached to the Westmoreland property. It is therefore our conclusion that the Government's mortgage lien is prior to the liens of the appellees.

The judgment appealed from is reversed, and this case is remanded to the trial court for further proceedings not inconsistent with the views expressed in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

II. *Judgment of Court of Appeals*

APPENDIX A

JUDGMENT

United States Court of Appeals for the Eighth Circuit

No. 15547—September Term, 1956.

Wednesday, June 26, 1957.

United States of America, Appellant, v. Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill & Mine Supply Company and Crow-Burlingame Company.

Appeal from the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause, be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court this day filed herein.

June 26, 1957.

APPENDIX B

I. *Defense Production Act of* 1950

(Act September 8, 1950, C.932, 64 Stat. 798)

Title 50 *U.S.C.A.* § 2062, 2092 *and* 2093

"§2062. Declaration of policy.

It is the policy of the United States to oppose acts of aggression and to promote peace by insuring respect for world law and the peaceful settlement of differences among nations. To that end this Government is pledged to support collective action through the United Nations and through regional arrangements for mutual defense in conformity with the Charter of the United Nations. The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out [its] purpose. Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian demand. In order that this diversion and expansion may proceed at once, and that the national economy may be maintained with the maximum effectiveness and the least hardship, normal civilian production and purchases must be curtailed and redirected.

It is the objective of this Act (sections 2061-2166 of this Appendix) to provide the President with authority to accomplish these adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act (said sections) to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and

foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise. September 8, 1950, c.932, § 2, 64 Stat. 798."

* * * * * * *

"§2092. Loans to private business enterprises.

To expedite production and deliveries or services to aid in carrying out Government contracts for the procurement of materials or the performance of services for the national defense, the President may make provision for loans (including participations in, or guarantees of, loans) to private business enterprises (including research corporations not organized for profit) for the expansion of capacity, the development of technological processes, or the production of essential materials, including the exploration, development, and mining of strategic and critical metals and minerals. Such loans may be made without regard to the limitations of existing law and on such terms and conditions as the President deems necessary, except that financial assistance may be extended only to the extent that it is not otherwise available on reasonable terms. September 8, 1950, c.932, Title III, § 302, 64 Stat. 801."

"§2093. Purchases of raw materials and installation of equipment—(a) Purchases for use or resale; development of strategic minerals and metals; * * *

To assist in carrying out the objectives of this Act (sections 2061-2166 of this Appendix) the President may make provision (1) for purchases of or commitments to purchase metals, minerals, and other materials, for Government use or resale; and (2) for the encouragement

of exploration, development, and mining of critical and strategic minerals and metals: *Provided however*, That purchases for resale under this subsection shall not include that part of the supply of an agricultural commodity which is domestically produced except insofar as such domestically produced supply may be purchased for resale for industrial uses or stockpiling, and no commodity purchased under this subsection shall be sold at less than the established ceiling price for such commodity (except that minerals and metals shall not be sold at less than the established ceiling price, or the current domestic market price, whichever is lower), or, if no ceiling price has been established, the higher of the following: (i) the current domestic market price for such commodity, or (ii) the minimum sale price established for agricultural commodities owned or controlled by the Commodity Credit Corporation as provided in section 407 of Public Law 439, Eighty-first Congress (section 1427 of Title 7): *Provided further, however*, That no purchase or commitment to purchase any imported agricultural commodity shall be made calling for delivery more than one year after the expiration of this Act (June 30, 1952).

TERMS AND CONDITIONS OF PURCHASES

(b) Subject to the limitations in subsection (a) (of this section) purchases and commitments to purchase and sales under such subsection may be made without regard to the limitations of existing law, for such quantities, and on such terms and conditions, including advance payments, and for such periods, but not extending beyond June 30, 1952, as the President deems necessary except that purchases or commitments to purchase involving higher than established ceiling prices (or if there be no established ceiling prices, currently prevailing market prices) or anticipated loss on resale shall not be made unless it is determined that supply of the materials could

not be effectively increased at lower prices or on terms more favorable to the Government, or that such purchases are necessary to assure the availability to the United States of overseas supplies."

II. *Pertinent Portions of the Arkansas Miners' Lien Law*

(5 Ark. Stats. (1947), Sec. 51-701 et seq.)

"§51-701. Contracting laborers and materialmen entitled to lien—Lien on leasehold interest.

Any person, corporation, firm, association, partnership, materialmen, artisan, laborer or mechanic, who shall under contract, express or implied, heretofore or hereafter made, with the owner or lessee of any land, mine or quarry, or the owner of any gas, oil or mineral leasehold interest in land, or the owner of any gas pipe line or oil pipe line, or owner of any oil or gas pipe line right of way, or with the trustee, agent or receiver of any such owner, perform labor or furnish fuel material, machinery or supplies, used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining or repairing any such oil or gas well, water well, mine or quarry, or oil or gas pipe line, including any and all tanks or other receptacles used or intended for the storage of oil, regardless of where such oil is produced shall have a lien on the whole of such land or leasehold interest therein, or oil pipe line, or gas pipe (such land or leasehold interest therein, or oil pipe line, or gas pipe) line, including the right of way for same, or lease for oil and gas purposes, the buildings and appurtenances, and upon the materials and supplies so furnished, and upon said oil well, gas well, water well, oil or gas pipe line, mine or quarry for which same are furnished, and upon all of the other oil wells, gas wells, buildings and appurtenances, including pipe line, leasehold interest and land used in operating for oil, gas and other minerals, upon such leasehold, or land or pipe line and

the right of way therefor, for which said material and supplies were furnished or labor performed, whether the same are movable or not. Provided, that if labor supplies, machinery, or material is furnished to a leaseholder the lien hereby created shall not attach to the underlying fee title to the land.

"§51-704. Priority of lien.

The lien hereby given against the land or leasehold interest therein and the oil pipe line or gas pipe line, including the right of way for same, and lease for oil and gas purposes, including the buildings and appurtenances situated thereon, upon the materials and supplies so furnished and upon said oil well, gas well, water well, oil or gas pipe line, mine or quarry for which such materials were furnished, or labor performed and upon all other oil wells, gas wells and water wells on such lands shall be prior and paramount to and in preference of any and all subsequent liens, encumbrances and mortgages and except as hereinafter provided all liens established hereunder shall be of equal dignity. The lien herein provided for shall attach to the machinery, material, supplies and the specific improvements made, in preference to any prior lien or encumbrance or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies or specific improvements are placed or located, provided, however, that any lien, encumbrance, or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for, shall not be affected thereby; and the holders of such liens upon such land or leasehold interest shall not be necessary parties in suits to foreclose the lien hereby created.

III. *State Laws as Rules of Decisions*

(*Title* 28, *U.S.C.A.*, §1652)

"§1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c.646, 62 Stat. 944.